

PETER S. HECKER (Bar No. 66159)
ANNA S. McLEAN (Bar No. 142233)
HELLER EHRMAN LLP
333 Bush Street
San Francisco, California 94104-2878
Telephone: (415) 772-6080
Facsimile: (415) 772-6268
peter.hecker@hellerehrman.com
anna.mclean@hellerehrman.com

FRANK BURT (*Pro Hac Vice*)
DENISE A. FEE (*Pro Hac Vice*)
JORDEN BURT LLP
1025 Thomas Jefferson Street, NW
Washington, DC 20007-0805
Telephone: (202) 965-8140
Facsimile: (202) 965-8104
fjb@jordenusa.com
daf@jordenusa.com

Attorneys for Defendant
AMERICAN SECURITY INSURANCE COMPANY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MICHELLE T. WAHL, on behalf of herself
and all others similarly situated,

Plaintiff,

v.

AMERICAN SECURITY INSURANCE
COMPANY; and DOES 1-50, inclusive,

Defendant.

Case No. C08-00555-RS

**DEFENDANT AMERICAN SECURITY
INSURANCE COMPANY'S NOTICE OF
MOTION AND MOTION FOR
SUMMARY JUDGMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

Hearing Date: April 1, 2009
Time: 9:30 a.m.
Courtroom: 4

TABLE OF CONTENTS

1		
2	TABLE OF AUTHORITIES.....	ii
3	NOTICE OF MOTION AND MOTION.....	iv
4	MEMORANDUM OF POINTS AND AUTHORITIES	1
5	I. INTRODUCTION	1
6	II. UNDISPUTED FACTS	1
7	A. The Rationale for Placing Insurance	1
8	B. Ms. Wahl’s Transaction	2
9	III. ALLEGATIONS	6
10	IV. STANDARD	6
11	V. ARGUMENT	7
12	A. EMC Acted Pursuant to its Contractual and Statutory Rights in	
13	Placing the ASIC Policy.....	7
14	1. EMC Purchased the ASIC Policy in Accordance with the	
15	Terms of the Deed of Trust	8
16	2. EMC Had the Statutory Right to Purchase Other Insurance.....	9
17	B. The ASIC Policy Insured the Property Beginning on January 27, 2006	11
18	1. Coverage Began Under the Master Policy on January 27, 2006.	11
19	2. The ASIC Policy Did Not Terminate at Inception.....	12
20	a. Under the Clear Terms of the ASIC Policy, it	
21	Did Not Terminate.	12
22	(1) Ms. Wahl Did Not Provide ASIC With	
23	Proof of Other Insurance.....	13
24	(2) The Farmers LLPE was not “another policy	
25	that meets the requirements of the Named Insured”	15
26	b. ASIC Could Not Cancel the Policy Without Giving Notice ..	17
27	C. The ASIC Policy Insured the Property Against Loss	17
28	1. EMC Waived its Coverage under the Farmers LLPE.....	17
	2. The Policy Benefits Were Equitably Prorated	19
	VI. CONCLUSION	20

TABLE OF AUTHORITIES

CASES

<i>Bank of America Nat'l Trust & Sav. Ass'n v. Allstate Ins. Co.</i> 29 F. Supp. 2d 1129 (C.D. Cal. 1998).....	6
<i>Breland v. All Am. Assurance Co.</i> 366 So. 2d 1051 (La. Ct. App. 1978)	16
<i>Carter v. Allstate Indem. Co.</i> 592 So. 2d 66 (Miss. 1991)	17
<i>Century Sur. Co. v. United Pac. Ins. Co.</i> 109 Cal. App. 4th 1246 (2003).....	19
<i>Dart Indus., Inc. v. Commercial Union Ins. Co.</i> 28 Cal. 4th 1059 (2002).....	19
<i>Fireman's Fund Ins. Co. v. Appalachian Ins. Co.</i> 572 F. Supp. 799 (E.D. Pa. 1983)	17
<i>Hayes v. Wells Fargo Home Mortgage</i> No. 06-1791, 2006 WL 3193743 (E.D. La. Oct. 31, 2006)	8
<i>Herd v. Am. Security Ins. Co.</i> 501 F. Supp. 2d 1240 (W.D. Mo. 2007).....	13
<i>Klotz v. Old Line Life Ins. Co. of America</i> 955 F. Supp. 1183 (N.D. Cal. 1996)	17
<i>Koltar v. Hartford Fire Ins. Co.</i> 83 Cal. App. 4th 1116 (2000).....	16
<i>Maron v. Foster Wheeler Corp.</i> No. C 95-0686 SI, 2002 WL 102605 (N.D. Cal. Jan. 17, 2002).....	6
<i>Northrop Grumman Corp. v. Factory Mut. Ins. Co.</i> 538 F.3d 1090 (9th Cir. 2008).....	6
<i>Oyola v. Empire Indem. Ins. Co.</i> No. 6:06-cv-510, 2006 WL 3708089 (M.D. Fla. Dec. 14, 2006)	14
<i>Thames v. Piedmont Life Ins. Co.</i> 197 S.E.2d 412 (Ga. Ct. App. 1973)	16
<i>Webb v. Chase Manhattan Mortgage Corp.</i> No. 2:05-cv-0548, 2008 WL 2230696 (S.D. Ohio May 28, 2008)	8
<i>Williams v. State Farm Fire & Cas. Co.</i> 216 Cal. App. 3d 1540 (1990).....	16

RULES

Fed. R. Civ. P. 56(c)	6
-----------------------------	---

STATUTES

Cal. Civ. Code § 1750 *et seq.* iv

Cal. Civ. Code § 2944.5 8

Cal. Civ. Code § 2955.5 8

Cal. Ins. Code § 677 16

Cal. Ins. Code § 677.4 16

Cal. Ins. Code § 770 9

Cal. Ins. Code § 771 9

Cal. Ins. Code § 861.05 9

REGULATIONS

Cal. Code Regs. tit. 10, § 107.601 9, 15

Cal. Code Regs. tit. 10, § 1499 15

Cal. Code Regs. tit. 10, § 2181.1 9

NOTICE OF MOTION AND MOTION

TO PLAINTIFF AND HER ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on April 1, 2009, at 9:30 a.m. or as soon thereafter as the matter may be heard, in Courtroom 4 of the above-referenced Court, located at 280 South First Street, San Jose, California 95113, pursuant to Federal Rule of Civil Procedure 56, defendant American Security Insurance Company (“ASIC”) will and hereby does move this Court to grant summary judgment in its favor on plaintiff’s First Amended Complaint (“FAC”), and the First, Second, Third, Fourth, Fifth, and Seventh Claims thereof.¹

This motion is made on the grounds that there are no disputed issues as to any material fact relevant to the policy interpretation issues underlying plaintiff’s claim of an alleged “overlap” between plaintiff’s lapsed Fire Insurance Exchange policy (the “Farmers policy”) and the ASIC policy, for the following reasons: (1) the ASIC policy provided coverage to plaintiff’s lender, EMC Mortgage Corporation (“EMC”), beginning as of January 26, 2006, the date plaintiff’s Farmers policy lapsed, because plaintiff had not responded to multiple requests for proof of acceptable alternative insurance, and (2) there was no overlap with plaintiff’s Farmers policy, because EMC waived any continuing protection under the Farmers Lenders Loss Payable Endorsement (“LLPE”), or, alternatively, benefits under the LLPE and the ASIC policy were equitably prorated as a matter of law.

This motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Declarations of Stella Matallana, Ronald K. Wilson, and Denise A. Fee in Support of ASIC’s Motion for Summary Judgment, and the Proposed Order, all filed herewith, the files and records in this case, and such argument and further filings and evidence as this Court may receive on this motion.

¹ The Sixth Cause of Action, for alleged violations of the Consumers Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.*, was dismissed pursuant to this Court’s Order Granting In Part and Denying In Part Motion to Dismiss, dated June 16, 2008 (Docket No. 39), and plaintiff elected not to amend her complaint in response to the defects noted by the Court in its Order.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Despite Michelle Wahl's strained interpretation of the contracts at issue, this is a simple case that raises no genuine issues of material fact. EMC provided Ms. Wahl with a substantial benefit by loaning her \$465,000 in exchange for her promise to, among other things, maintain insurance coverage on EMC's collateral—the property.² Ms. Wahl failed to perform her end of the bargain, and so EMC obtained an insurance policy from ASIC at Ms. Wahl's expense, as was EMC's right under the terms of the Deed of Trust.³ Ms. Wahl complains that the ASIC policy provided no benefit to EMC because her cancelled insurance policy contained a provision that potentially extended some coverage to EMC for some period of time after Ms. Wahl's policy was terminated by her insurer.

Ms. Wahl's claims fail as a matter of law. The ASIC policy provided coverage to EMC commencing on the date that Ms. Wahl's prior homeowner's policy was cancelled and continuing until the date the ASIC policy was cancelled, which was nearly a year and a half later. ASIC did not violate any common or statutory law in accepting premiums for that policy from EMC, which EMC later charged to Ms. Wahl's escrow account as provided by the Deed of Trust.

II. UNDISPUTED FACTS

A. The Rationale for Placing Insurance

EMC is the mortgagee, or mortgage servicer, for 81,689 home loans secured by real properties located in California. Declaration of Stella Matallana ("Matallana Decl.") ¶ 4. Without protecting the collateral in these loans, EMC would not be able to provide financing for those mortgage transactions. *Id.* ¶ 5. EMC ensures that its collateral is protected in two ways: first, requiring the mortgagor to maintain acceptable property insurance coverage; and second, contracting with ASIC to obtain insurance on the property

² The property discussed throughout this Memorandum is 785 Logan Creek Road, Boulder Creek, CA 95008.

³ "Deed of Trust" and "mortgage" are used interchangeably throughout this Memorandum.

1 in the event the mortgagor fails to maintain acceptable coverage. *See, e.g.*, Matallana Decl.
2 Ex. B (Ms. Wahl’s Deed of Trust) at ASIC-WAHL0000154 ¶ 5 (“Borrower shall keep the
3 improvements now existing or hereafter erected on the Property insured. . . . If Borrower
4 fails to maintain any of the coverages described above, Lender may obtain insurance
5 coverage.”).

6 To effectuate the second part of that strategy, EMC and ASIC entered into a Master
7 Residential Property Agreement (the “Master Policy”) on August 31, 2000, which
8 automatically triggers ASIC insurance coverage whenever a homeowner fails to provide
9 proof of acceptable insurance coverage to EMC. *See* Matallana Decl. ¶¶ 7, 8; Declaration
10 of Ronald K. Wilson (“Wilson Decl.”) ¶¶ 4, 5. The Master Policy operates to insure EMC
11 against loss for the period and in the amount provided on the additional insured
12 endorsement issued to a particular mortgagor. Matallana Decl. Ex. A at ASIC-
13 WAHL0000206-07.

14 **B. Ms. Wahl’s Transaction**

15 Ms. Wahl refinanced her house in 2004, secured by a Deed of Trust between her and
16 EMC. She signed the Deed of Trust, agreeing to “keep the improvements now existing or
17 hereafter erected on the Property insured against loss by fire, hazards included within the
18 term ‘extended coverage,’ and any other hazards including, but not limited to, earthquakes
19 and floods, for which Lender requires insurance. The insurance shall be maintained in the
20 amounts (including deductible levels) and for the periods that Lender requires. What
21 Lender requires pursuant to the preceding sentences can change during the term of the
22 Loan.” Matallana Decl. Ex. B at ASIC-WAHL0000154 ¶ 5; *see* Matallana Decl. ¶ 14.

23 To fulfill that contractual obligation, Ms. Wahl purchased the Farmers policy in July
24 2005 to insure the property for one year, paying half of the premium at inception and
25 agreeing to pay the other half six months later. The Farmers policy contained a Lenders
26 Loss Payable Endorsement, in accordance with the requirements of Ms. Wahl’s Deed of
27 Trust, protecting EMC’s interest in the property separate and apart from Ms. Wahl’s
28 interest. The LLPE contains a cancellation provision, which states that “[t]his Company

1 reserves the right to cancel this policy at any time, as provided by its terms, but in such case
 2 this policy shall continue in force for the benefit of the Lender for ten (10) days after written
 3 notice of such cancellation is received by the Lender and shall then cease.”⁴ Wilson Decl.
 4 Ex. 23 at ASIC-WAHL0000404 ¶ 6. The LLPE also permits the Lender to waive any post-
 5 cancellation coverage under it: “[t]his policy shall remain in full force and effect as to the
 6 interest of the Lender for a period of ten (10) days after its expiration unless an acceptable
 7 policy in renewal thereof with loss thereunder payable to the Lender in accordance with the
 8 terms of this Lender’s Loss Payable Endorsement, shall have been issued by some insurance
 9 company and accepted by the Lender.” *Id.* ¶ 7.

10 In 2005, EMC received a notice cancelling Ms. Wahl’s prior insurance policy
 11 effective July 29, 2005, but did not receive proof that Ms. Wahl purchased new coverage.
 12 Wilson Decl. Ex. 5. EMC notified Ms. Wahl on August 3, 2005 that there was no proof of
 13 adequate insurance and therefore EMC had arranged for temporary coverage from ASIC.
 14 Wilson Decl. Ex. 6. Ms. Wahl then provided that proof and EMC cancelled the temporary
 15 binder of insurance on August 15, 2005. *See* Wilson Decl. Ex. 8 (EMC “has received
 16 information regarding your current insurance policy and the temporary binder EMC placed
 17 to protect your home has been cancelled, effective with the above cancellation date. There
 18 has been no charge to your escrow account for this binder coverage.”).

19 Six months later, Ms. Wahl’s second premium on her Farmers policy became due.
 20 On January 13, 2006, Ms. Wahl received a “Cancellation Notice (Non-Payment of
 21 Premium)” from Farmers, which stated that “[t]he payment to keep your policy in force was
 22 not received by 1-12-06. *Your policy is cancelled effective 1-27-06 at 12:01 A.M. . . . If we*
 23 *receive your payment of \$1,228.74 by 1-27-06, your policy will continue without*
 24 *interruption of coverage.”* Declaration of Denise A. Fee (“Fee Decl.”) Ex. 1. Despite her

25 ⁴ The Farmers policy allows Farmers to “cancel this policy only for the following reasons: (1) Non-
 26 payment of premium, whether payable to us or our agent. We may cancel at any time by notifying
 27 you at least 10 days before the date cancellation takes effect.” Wilson Decl. Ex. 23 at ASIC-
 28 WAHL0000383.

1 obligation to maintain insurance on the property, Ms. Wahl did not pay the premium to
2 Farmers and her policy was cancelled on January 27, 2006. Farmers notified her of that fact
3 in a February 6, 2006 letter, which also was sent to and received by EMC the next day. *See*
4 FAC Ex. B (“YOUR POLICY IS OUT OF FORCE”) (Docket No. 14); Wilson Decl. Ex. 5
5 (cancellation letter received by EMC on February 7, 2006); Wilson Decl. Ex. 22 at ASIC-
6 WAHL0001281 (“we received the notification in February”) and ASIC-WAHL0001287
7 (“we then received a cancellation from Farmers due to nonpayment”).

8 Upon notification that the Farmers policy had cancelled, EMC on three separate
9 occasions solicited evidence of acceptable coverage from Ms. Wahl. The first letter, dated
10 February 27, 2006, stated that EMC had not “received a new or renewal policy covering
11 your house. It appears that you do not have any insurance coverage as of the expiration date
12 above. Please contact your agent or company and purchase coverage. If you have already
13 done so, please request proof of coverage and send it to the address below. . . . Until we
14 receive your policy, we have secured temporary insurance coverage in the form of a sixty-
15 day binder through ASIC. . . . If proof of insurance is not supplied within 60 days, EMC
16 will be required to obtain adequate insurance coverage at your expense. . . . Any policy we
17 purchase on your behalf may be cancelled at any time by providing proof of acceptable
18 insurance coverage.” Wilson Decl. Ex. 10.

19 The second letter, dated April 3, 2006, echoed the first, and also stated that “[i]f you
20 do not provide us with proof of insurance coverage before the end of the binder period, we
21 will be required to obtain a one-year policy on your property.” Wilson Decl. Ex. 11. The
22 April 3, 2006 letter also advised that “[a]ny policy purchased on your behalf may be
23 cancelled at any time by providing proof of acceptable insurance.” *Id.* Attached to the
24 letter was a binder of insurance issued by ASIC, which covered the property effective
25 January 27, 2006, the day Ms. Wahl’s Farmers policy lapsed, and reiterated that a full-year
26 policy would be issued “if you do not give [EMC] proof of insurance on your house.” *Id.* at
27 WAHL0043.

28 Not receiving proof of other insurance, EMC finally purchased a one-year policy

1 from ASIC, insuring the property from January 27, 2006 to January 27, 2007. *See* Wilson
2 Decl. Exs. 12 & 13. EMC contacted Ms. Wahl a third time, notifying her on May 12, 2006
3 of the one-year ASIC policy and again informing her of her option to obtain a policy of her
4 choice: “[y]ou have the right to obtain insurance coverage from an agent/insurance
5 company of your choice. By providing evidence that you have obtained acceptable
6 insurance coverage, this concern can be eliminated. . . . Please contact your agent or
7 company and purchase coverage. If you have already done so, please request proof of
8 coverage and send it to the address below.” Wilson Decl. Ex. 12.⁵

9 Nearly a year later, in a letter dated December 29, 2006, EMC contacted Ms. Wahl
10 for a fourth time about her property insurance obligation, notifying her that the ASIC policy
11 would be renewed unless she provided proof of other acceptable insurance coverage. EMC
12 reminded Ms. Wahl that it “originally placed this policy on your property because
13 acceptable proof of coverage was not provided. . . . Any policy purchased on your behalf
14 may be cancelled at any time by providing EMC with proof of other acceptable insurance.
15 . . . Upon receipt of proof of coverage, this policy will not renew or will promptly be
16 cancelled.” Wilson Decl. Ex. 14. Not receiving proof of other insurance, EMC renewed the
17 ASIC policy and informed Ms. Wahl of that fact in March 2007. *See* Wilson Decl. Ex. 15
18 (“**Please contact your agent or company and purchase coverage.** If you have already
19 done so, please request proof of coverage and send it to us at the address below.”).

20 After EMC purchased the one-year renewal ASIC policy, Ms. Wahl secured a new
21 Farmers policy in July 2007 and notified EMC of that fact. EMC then promptly cancelled
22 the ASIC policy as of the effective date of Ms. Wahl’s new Farmers policy. *See* Wilson
23 Decl. Ex. 18 (“The reason for this cancellation is: You provided evidence of other insurance
24 coverage.”). The following year, Ms. Wahl again notified EMC that she had purchased
25

26 ⁵ The ASIC policy contains a cancellation provision: “Coverage under this policy shall
27 automatically and without prior notice, cancel when the Named Insured . . . has been provided with
28 another policy that meets the requirements of the Named Insured as set forth in the mortgage
agreement applicable to the Described Property.” Wilson Decl. Ex. 16 at WAHL0025.

1 insurance on the property. *See* Wilson Decl. Ex. 22 at ASIC-WAHL0001298 (“I am calling
2 you to provide you evidence of insurance for this policy.”).

3 **III. ALLEGATIONS**

4 Ms. Wahl brings claims for breach of contract, breach of statutory duty to disclose,
5 constructive fraud, failure of consideration, and violation of the Unfair Competition Law
6 against ASIC, not EMC. Each of those causes of action arises from a claimed “overlap” in
7 coverage between the cancelled Farmers policy LLPE and the ASIC policy purchased by
8 EMC. Because of that supposed overlap, Ms. Wahl alleges that the ASIC policy either
9 terminated at inception or provided her with no benefits and, consequently, ASIC acted
10 wrongfully in accepting premiums from EMC that EMC later charged to Ms. Wahl pursuant
11 to her Deed of Trust.⁶

12 **IV. STANDARD**

13 Summary judgment must be granted when “the pleadings, the discovery and
14 disclosure materials on file, and any affidavits show that there is no genuine issue as to any
15 material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
16 56(c). Issues of policy interpretation are particularly well suited for summary judgment.
17 *See Northrop Grumman Corp. v. Factory Mut. Ins. Co.*, 538 F.3d 1090, 1098 (9th Cir.
18 2008). Summary judgment is granted where the non-moving party fails to offer material
19 evidence contradicting “the defendant’s ‘amply supported’ interpretation of the contract.”
20 *Maron v. Foster Wheeler Corp.*, No. C 95-0686 SI, 2002 WL 102605, at *2 (N.D. Cal. Jan.
21 17, 2002) (attached as Fee Decl. Ex. 2); *see Bank of America Nat’l Trust & Sav. Ass’n v.*
22 *Allstate Ins. Co.*, 29 F. Supp. 2d 1129, 1139 (C.D. Cal. 1998) (“when the nonmoving party
23 has no evidence to support a contradictory interpretation of an instrument, summary
24 judgment is appropriate”).

25 ⁶ *See* FAC ¶ 1 (alleging that the ASIC policy “overlaps with the consumers’ prior homeowner
26 insurance, and therefore provides no actual coverage under the terms of defendant’s own FPI
27 policies; [c]harging premiums for FPI during the overlap is a breach under the terms of defendant’s
28 own FPI policies; [and f]ailing to disclose the overlap is a violation of defendant’s statutory duties
under the Insurance Code, and is constructive fraud”).

V. ARGUMENT

The ASIC policy insured Ms. Wahl's property commencing on the date that the Farmers policy cancelled and continuing until the date Ms. Wahl purchased a later Farmers policy. ASIC coverage began on January 26, 2006 as provided by the Master Policy between ASIC and EMC. Notwithstanding the LLPE in the cancelled Farmers policy, coverage commenced and remained in force under the ASIC policy for at least two independently dispositive reasons: (1) by purchasing the ASIC policy, EMC waived any continuing protection under the Farmers LLPE; and (2) the ASIC policy and the Farmers LLPE were equitably prorated as a matter of law. ASIC did not act in derogation of common or statutory law by receiving premium from EMC that EMC later charged to Ms. Wahl's escrow account, or by not informing her of the supposed "overlap" in coverage.

A. **EMC Acted Pursuant to its Contractual and Statutory Rights in Placing the ASIC Policy.**

While Ms. Wahl mischaracterizes lender-placed insurance as costly and inferior, FAC ¶ 14, lender-placed insurance plays a valuable role in mortgage transactions, as recognized by the California legislature, Department of Insurance, and the contracting parties themselves.

1. **EMC Purchased the ASIC Policy in Accordance with the Terms of the Deed of Trust.**

When Ms. Wahl failed to provide proof of acceptable insurance, EMC acted within its contractual rights in obtaining insurance from ASIC. The Deed of Trust provides that "[i]f Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. . . . Borrower acknowledges that the cost of the insurance so obtained might significantly exceed the cost of insurance that Borrower could have obtained." Matallana Decl. Ex. B at ASIC-WAHL0000154 ¶ 5. In connection with her mortgage transaction, Ms. Wahl also received a document from Argent, the predecessor in interest to EMC, notifying her that "[i]f you do

1 not provide us with evidence of the insurance coverage as required by your agreement with
 2 us, we may purchase insurance at your expense to protect our interests in your collateral.
 3 This insurance may, but need not, protect your interests. . . . You may later cancel any
 4 insurance purchased by us, but only after providing us with evidence that you have obtained
 5 insurance as required by our agreement.” Matallana Decl. Ex. E.

6 Other courts interpreting the same contract language have concluded that lenders
 7 may properly obtain other insurance in these circumstances. In *Webb v. Chase Manhattan*
 8 *Mortgage Corp.*, No. 2:05-cv-0548, 2008 WL 2230696, at *17 (S.D. Ohio May 28, 2008)
 9 (attached as Fee Decl. Ex. 3), the lender “contacted Plaintiff Webb to request his current
 10 insurance information. Plaintiff Webb failed to respond to [the lender’s] request for
 11 information, ignored correspondence from MIG directing him to send all insurance
 12 information, including insurance bills to [the lender], and disregarded a stream of
 13 correspondence from TFI alerting him that his premium was due, then overdue.” The *Webb*
 14 court found that the lender “did not breach any of Plaintiff Webb’s mortgage documents in
 15 securing replacement insurance coverage on Plaintiff’s property. Rather, the fault appears
 16 to lie with Plaintiff Webb.” *Id.* at *19; *see also Hayes v. Wells Fargo Home Mortgage*, No.
 17 06-1791, 2006 WL 3193743, at *4 (E.D. La. Oct. 31, 2006) (finding that the lender was
 18 “within its contractual rights under the Mortgage Agreement” to place an insurance policy
 19 upon the failure of the insured to obtain adequate insurance) (attached as Fee Decl. Ex. 4).

20 **2. EMC Had the Statutory Right to Purchase Other Insurance.**

21 The California legislature, recognizing the important role lender-placed insurance
 22 plays in ensuring the continued availability of mortgages, has acknowledged that
 23 mortgagees have a right to purchase insurance on their collateral. The California Insurance
 24 Code contains numerous provisions delineating what a mortgagee may or may not require
 25 in an insurance contract.⁷ Despite such limitations, the statutes do not preclude the exercise

26 ⁷ See Cal. Civ. Code § 2944.5 (no mortgagee “shall refuse to accept a policy issued by an admitted
 27 insurer solely because the policy is issued for a continuous period without a fixed expiration date”);
 28 Cal. Civ. Code § 2955.5(a) (no lender shall require a borrower “to provide hazard insurance
 coverage against risks to the improvements on that real property in an amount exceeding the

(footnote continued on following page)

1 by a lender “of his *right* to furnish such insurance or to renew any insurance required by the
 2 contract of sale or trust deed or other loan agreement if the borrower or purchaser shall have
 3 failed to furnish the insurance or renewal thereof within such reasonable time or form as
 4 may be specified in the sale or loan agreement.” Cal. Ins. Code § 771(a) (entitled
 5 “Permissible actions”) (emphasis supplied). Similarly, a lender has a statutorily-recognized
 6 “*right to furnish such insurance or to renew such insurance, and to charge the account of*
 7 *the borrower or purchaser with the costs thereof*, if the borrower or purchaser fails to
 8 *deliver to the lender* such insurance at least 30 days prior to the expiration of the policy.”
 9 Cal. Ins. Code § 771(d) (emphasis supplied).⁸

10 Not only has the California legislature recognized the right of lenders to purchase
 11 insurance covering their collateral, the California Department of Insurance specifically
 12 reviewed and approved ASIC’s lender-placed program. For example, in submitting its rates
 13 for approval, the Department of Insurance requested, and ASIC provided, a mortgage
 14 service program manual describing the ASIC program: “[t]his program is designed to allow
 15 financial institutions to place dwelling fire coverage on those mortgages which are not
 16 protected by insurance coverage under the mortgage agreement. . . . Flat cancellation if
 17 duplicate coverage exists.” Wilson Decl. Ex. 20 at ASIC-WAHL0000042. The Department
 18 approved ASIC’s filings and stated that ASIC “may immediately issue policies pursuant to
 19 this approval.” Wilson Decl. Ex. 21 (“The Department has completed its review of the
 20 application for the above line of insurance or program and has determined that the rates at
 21 this time are in conformance with Section 1861.05(a) of the California Insurance Code”).

22 **B. The ASIC Policy Insured the Property Beginning on January 27, 2006.**

23 The ASIC policy insured the Wahl property commencing on January 27, 2006, as
 24 replacement value of the improvements on the property.”); Cal. Ins. Code § 770 (no mortgagee can
 25 require the mortgagor to “negotiate any insurance or renewal thereof covering such property
 through a particular insurance agent or broker.”).

26 ⁸ See also Cal. Code Regs. tit. 10, § 107.601(a) (a lender “shall have the right to furnish or renew
 27 such insurance if the borrower or purchaser shall have failed to furnish the insurance or renewal
 28 thereof within such reasonable time or form as may be specified in the sale or loan agreement.”); §
 2181.1(a) (same).

provided by the Master Policy between EMC and ASIC. The ASIC policy did not terminate at inception as Ms. Wahl contends, because Ms. Wahl never provided EMC with proof of other acceptable insurance sufficient to cancel the ASIC policy.

1. Coverage Began Under the Master Policy on January 27, 2006.

EMC entered into the Master Policy with ASIC to provide seamless coverage between the termination of a homeowner's prior insurance and the coverage under an ASIC policy. Matallana Decl. ¶ 8; Wilson Decl. ¶ 5. The Master Policy requires ASIC to provide coverage "to each individual covered property during the policy period specified on each individual Additional Insured Endorsement." Matallana Decl. Ex. A at ASIC-WAHL0000207. The servicing Agreement between EMC and ASIC clarifies that coverage exists under the Master Policy even if a loss occurs after the termination of the homeowner's chosen insurance but no separate ASIC policy has issued: "if there is a loss to residential Eligible Property that would have been covered under the Hazard PLUS Policy, and if (i) Acceptable Hazard Insurance covering that Eligible Property has terminated prior to loss, (ii) no Hazard PLUS Policy was in effect on the date of loss, and (iii) Hazard Insurance has not been waived by Servicer, Company will issue a Hazard PLUS Policy effective as of the date Acceptable Hazard Insurance terminated." Matallana Decl. Ex. C at ASIC-WAHL0000120.

Ms. Wahl's Additional Insured Endorsement lists the inception date of coverage as of January 27, 2006, the date the Farmer's coverage cancelled. Wilson Decl. Ex. 11 at WAHL0043; Wilson Decl. ¶¶ 26, 28. Ms. Wahl recognized this seamless transition in a phone call with an EMC representative: "Q. Did you not have your own insurance in 2006? A. We did. And then it lapsed. It was like Farmers in Capitola. And then it lapsed. And then we had yours. And then we got on board again with Farmers." Wilson Decl. Ex. 22 at ASIC-WAHL0001290. Had there been a loss on or after January 27, 2006, it would have been covered by ASIC. *See id.* at ASIC-WAHL0001287 (the ASIC policy "was effective January 27 of 2006. . . . If there was a loss that was sustained during that time period, it would be covered by our policy"); Wilson Decl. Ex. 4 at ASIC-WAHL0000166

1 (“Whenever mortgagors’ outside insurance expires on a homeowner or fire policy, the
2 dwelling is covered by an [ASIC] policy.”).

3 Because ASIC would have insured EMC in the event of a loss anytime on or after
4 January 27, 2006, Ms. Wahl’s additional insured endorsement was not “backdated” but
5 rather reflected the actual obligation that ASIC assumed under the Master Policy. *See*
6 Wilson Decl. ¶ 28 (“If there had been a covered loss on the property anytime between
7 January 26, 2006 and July 19, 2007 . . . ASIC would have reimbursed EMC for the loss and
8 would not have sought indemnification from the Fire Insurance Exchange”); Matallana
9 Decl. ¶¶ 11, 12 (“If there had been a covered loss on the Property between January 27, 2006
10 and July 19, 2007, EMC would have made a claim to ASIC and not to the Fire Insurance
11 Exchange under any LLPE”).

12 **2. The ASIC Policy Did Not Terminate at Inception.**

13 **a. Under the Clear Terms of the ASIC Policy, it Did Not** 14 **Terminate.**

15 In the Motion to Dismiss briefing, Ms. Wahl advanced a novel theory – that the
16 existence of the Farmers LLPE cancelled the ASIC policy at inception – based on the ASIC
17 policy’s cancellation provision. The ASIC policy provides that “[c]overage under this
18 policy shall automatically and without prior notice, cancel when the Named Insured . . . *has*
19 *been provided with* another policy that meets the requirements of the Named Insured as set
20 forth in the mortgage agreement applicable to the Described Property.” Wilson Decl. Ex. 16
21 at WAHL0025 (emphasis supplied). Plaintiff argues that the pre-existence of the Farmers
22 LLPE cancelled the ASIC policy at its inception because it was “another policy” about
23 which EMC already was aware. However, Ms. Wahl failed to provide any evidence of
24 coverage to EMC after Farmers cancelled her policy, and the Farmers LLPE was not
25 “another policy that meets the requirements of the named insured.” Moreover, the
26 contracting parties did not intend for the ASIC policy to cancel at inception, even if there
27 was some potential for continuing coverage under the Farmers policy LLPE. *See* Wilson
28 Decl. ¶ 27.

(1) **Ms. Wahl Did Not Provide ASIC With Proof of Other Insurance.**

In signing the Deed of Trust, Ms. Wahl did not merely agree to keep the property insured; she agreed to provide EMC with proof of acceptable insurance upon request. Matallana Decl. Ex. B at ASIC-WAHL0000154 ¶ 5 (Ms. Wahl agreed to “promptly give to Lender all receipts of paid premiums and renewal notices.”). That requirement was acknowledged in nearly every document Ms. Wahl received from EMC. For example, as part of the initial mortgage transaction, Ms. Wahl was provided a document entitled “Hazard Insurance Requirements,” which stated that “as a condition of receiving or maintaining a loan with the lender shown above, you will be required to provide proof of hazard insurance coverage in an amount equal to the unpaid principal balance owing on the loan or the replacement value of all improvements located on the collateral property, **whichever is less.** . . . If you do not provide us with evidence of the insured coverage as required by your agreement with us, we may purchase insurance at your expense to protect our interests in your collateral. . . . You may later cancel any insurance purchased by us, but only after providing us with evidence that you have obtained insurance as required by our agreement.” Matallana Decl. Ex. E.

The necessity for Ms. Wahl to provide proof of insurance was reiterated time and time again in the many letters sent by EMC to Ms. Wahl. The very first letter on February 27, 2006 noted that EMC had “not *received* a new or renewal policy covering your house. . . . Please contact your agent or company and purchase coverage. If you have already done so, please *request proof of coverage and send it to the address below.* . . . Until we *receive* your policy, we have secured temporary insurance coverage in the form of a sixty-day binder through ASIC. . . . If *proof of insurance is not supplied* within 60 days, EMC will be required to obtain adequate insurance coverage at your expense. . . . Any policy we purchase on your behalf may be cancelled at any time by *providing proof* of acceptable insurance coverage.” Wilson Decl. Ex. 10 (emphasis supplied). All subsequent letters

1 echoed these requirements.⁹

2 Not only was Ms. Wahl required to provide EMC with evidence of other acceptable
3 insurance, but the ASIC policy did not cancel unless and until EMC “*has been provided*
4 *with another policy* that meets the requirements of the Named Insured.” Wilson Decl. Ex.
5 16 at WAHL0025. The court in *Herd v. Am. Security Ins. Co.*, 501 F. Supp. 2d 1240, 1251
6 (W.D. Mo. 2007), interpreting the very same language and addressing the same issue, found
7 on summary judgment that a nearly identical ASIC policy was in force because the
8 mortgagor had not provided the lender with proof of other insurance coverage. The *Herd*
9 court found:

10 Given the repeated letters from EMC notifying the Herds of its belief that
11 they did not have insurance coverage, it cannot be said that the Herds had
12 made available, furnished, supplied, afforded, or yielded another policy to
13 EMC. The mere fact that the Herds had insurance coverage all along does
14 not mean that they ‘provided EMC with another policy’ that met its
15 requirements. Given EMC’s May 1, 2006, letter warning that ‘If you do
16 not provide us with proof of insurance coverage before the end of the
binder period, we will be required to obtain a one-year policy on your
property,’ and given the fact that EMC went on to procure the annual
policy, *no reasonable juror could find that the Herds had provided EMC*

17 ⁹ See Wilson Decl. Ex. 11 at WAHL0041-42 (EMC “notified you that our records indicate that we
18 had not received a new or renewal insurance policy covering your house. . . . Any policy purchased
19 on your behalf may be cancelled at any time by providing proof of acceptable insurance. . . . If you
20 do not provide us with proof of insurance coverage before the end of the binder period, we will be
21 required to obtain a one-year policy on your property. . . . Upon receipt of your policy, this binder
22 will be promptly cancelled.”); Wilson Decl. Ex. 11 at WAHL0043 (“The lender will place a policy
23 for you if you do not give them proof of insurance on your house.”); Wilson Decl. Ex. 12 (“By
24 providing evidence that you have obtained acceptable insurance coverage, this concern can be
25 eliminated. . . . Please contact your agent or company and purchase coverage. If you have already
26 done so, please request proof of coverage and send it to the address below.”); Wilson Decl. Ex. 14
27 (EMC “originally placed this policy on your property because acceptable proof of coverage was not
28 provided. . . . Any policy purchased on your behalf may be cancelled at any time by providing
EMC with proof of other acceptable insurance. . . . Upon receipt of proof of coverage, this policy
will not renew or will promptly be cancelled. . . . Please contact your agent or company and
purchase coverage. If you have already done so, please request proof of coverage and send it to the
address below.”); Wilson Decl. Ex. 15 (EMC “originally placed this policy on the property because
acceptable proof of coverage was not provided. . . . **Please contact your agent or company and
purchase coverage.** If you have already done so, please request proof of coverage and send it to the
address below. . . . Upon receipt of proof of coverage, this policy will be promptly cancelled. . .
. Any policy purchased on your behalf may be cancelled at any time by providing us with proof of
other acceptable insurance.”).

with another policy that met its requirements.

Id. (citations omitted) (emphasis supplied). This outcome is consistent with the language of the ASIC policy at issue here.¹⁰

Ms. Wahl understood this process, as she had been through it once before. In August 2005, EMC placed an ASIC policy on the property, and then cancelled it upon receiving notification that the property was acceptably insured by Farmers. Wilson Decl. Ex. 8. When Ms. Wahl purchased her second Farmers policy, EMC cancelled the ASIC policy upon notification of that new policy. Wilson Decl. Ex. 18 (“The reason for this cancellation is: You provided evidence of other insurance coverage.”); *see* Wilson Decl. Ex. 22 at ASIC-WAHL0001298 (“I am calling you to provide you evidence of insurance for this policy.”).

Before EMC would cancel the ASIC policy, the Deed of Trust required Ms. Wahl to provide proof of other acceptable insurance. It is undisputed that Ms. Wahl did not do so until nearly a year and a half later, when she purchased a second Farmers policy. Thus, as a matter of law, the ASIC policy did not terminate at inception because Ms. Wahl had not satisfied the terms of her Deed of Trust by providing EMC with proof that she obtained other acceptable insurance.

(2) The Farmers LLPE was not “another policy that meets the requirements of the Named Insured.”

Both the Deed of Trust and the California regulatory scheme contain guidelines for what constitutes acceptable insurance. The Deed of Trust required Ms. Wahl to maintain insurance “in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. . . . All insurance policies required by Lender and renewals of such policies shall be subject to Lender’s right to disapprove such policies, shall include a

¹⁰ *See also Oyola v. Empire Indem. Ins. Co.*, No. 6:06-cv-510, 2006 WL 3708089, at *2 (M.D. Fla. Dec. 14, 2006) (“Empire now seeks to have the cancellation provision interpreted so that it would be given legal effect (and cancel its policy) on the first date that other coverage is found to have existed. But such is not the language employed by Empire in drafting this provision. To activate the cancellation, Empire *required the provision of an acceptable policy, not merely the existence of coverage.*”) (emphasis supplied) (attached as Fee Decl. Ex. 5).

1 standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss
2 payee.” Matallana Decl. Ex. B at ASIC-WAHL0000154 ¶ 5.¹¹

3 The California Insurance Code and related regulations recognize grounds for
4 refusing to accept a particular insurance policy. For example, reasonable cause exists to
5 reject an insurance policy if the policy fails “to stipulate on the face of the policy or the
6 declarations page that the term of the policy shall be continuous until cancelled or
7 nonrenewed or for no less than three years, although premium payments may be on an
8 annual basis for a three year policy.” Cal. Code Regs. tit. 10, § 107.601(b)(4). A lender
9 may similarly disapprove of a policy if it fails to “[a]fford the customary coverage required
10 by the lender for the class of property involved including the loss payable endorsement
11 required by the lender.” Cal. Code Regs. tit. 10, § 1499(b)(4).

12 The Farmers LLPE, without more, fails to satisfy either the Deed of Trust or these
13 statutory requirements. Matallana Decl. ¶ 16. Additionally, the term of the LLPE was not
14 one year or continuous until cancelled, but was rather some specific and delineated time
15 after a particular occurrence. *See* Wilson Decl. Ex. 23 at ASIC-WAHL0000403-04 ¶ 3
16 (coverage may continue for 70 – 130 days after non-payment of premium), ¶ 6 (coverage
17 may continue for ten days after cancellation). Moreover, the numerous documents requiring
18 that the policy “contain” an LLPE indicate plainly that continuing coverage under an LLPE
19 alone does not constitute acceptable insurance. *See* Matallana Decl. Ex. B at ASIC-
20 WAHL0000154 ¶ 5; Wilson Decl. Exs. 10-12, 14-15.

21 **b. ASIC Could Not Cancel the Policy Without Giving**
22 **Notice.**

23 Plaintiffs’ “cancellation-at-inception” theory is an impossibility under California
24 law, as cancellation is not valid until the insurer gives notice to the parties and in the time
25 frame prescribed by statute. Before a policy insuring residential property may be cancelled,

26 ¹¹ The numerous letters sent to Ms. Wahl urging her to purchase her own insurance also reminded
27 her that a replacement policy would only be acceptable if it *included* an LLPE naming EMC as the
28 mortgagee. *See* Wilson Decl. Exs. 10-12, 14-15 (“Please be sure your policy includes your loan
number and a Mortgagee Clause or Lender Loss Payable Endorsement made out to: [EMC].”).

the insurer must provide the insured with notice of the cancellation. *See* Cal. Ins. Code § 677 (“All notices of cancellation shall be in writing, mailed to the named insured at the address shown in the policy”); § 677.4 (stating that the notice must be delivered 20 days prior to the cancellation for most cancellation grounds); *Williams v. State Farm Fire & Cas. Co.*, 216 Cal. App. 3d 1540, 1544 (1990) (notice of cancellation must be in writing). The statutory prerequisites apply even where a policy contains an automatic termination provision.¹² Thus, a policy cannot cancel at inception – at the earliest it may be cancelled only upon written notice. The ASIC policy was not cancelled until Ms. Wahl purchased the later Farmers policy and ASIC sent its notice of cancellation to Ms. Wahl. *See Koltar v. Hartford Fire Ins. Co.*, 83 Cal. App. 4th 1116, 1121 (2000) (“[i]f a cancellation is defective, the policy remains in effect”).

C. The ASIC Policy Insured the Property Against Loss.

Since the ASIC policy did not cancel at inception, but rather commenced and continued coverage on the property starting on January 26, 2006, the ASIC policy provided benefit to EMC. It did so because EMC waived the potentially continuing protection of the Farmers LLPE by purchasing the ASIC policy, or because both insurers would be required to contribute on a pro rata basis in the event of a loss.

1. EMC Waived its Coverage under the Farmers LLPE.

EMC’s purpose in entering into the Master Policy and servicing Agreement was to ensure that an ASIC policy would protect its interest whenever the homeowner’s insurance was not in force. Understanding that it would potentially have some limited protection under the cancelled Farmers policy LLPE, EMC nevertheless decided to insure the property with ASIC and to waive any residual lender protection under the terminated policy. EMC’s actions fit the textbook definition of waiver: “there must be an existing right, a knowledge of its existence, and actual intention to relinquish it, or conduct so inconsistent with the

¹² *See Breland v. All Am. Assurance Co.*, 366 So. 2d 1051, 1053 (La. Ct. App. 1978); *Thames v. Piedmont Life Ins. Co.*, 197 S.E.2d 412, 414 (Ga. Ct. App. 1973) (the notice statutes become part of the contract).

1 intent to enforce the right as to induce a reasonable belief that it has been relinquished.”
 2 Pl’s Opp. to Mt. to Dismiss at 19 (citing *Klotz v. Old Line Life Ins. Co. of America*, 955 F.
 3 Supp. 1183, 1186 (N.D. Cal. 1996)) (Docket No. 27).

4 Two cases have addressed this very issue – whether the homeowner’s mortgagee
 5 clause continues in effect when the first policy has been cancelled as to the mortgagor and
 6 another policy is purchased. Both courts found that only the second policy insured the
 7 property. In *Fireman’s Fund Ins. Co. v. Appalachian Ins. Co.*, 572 F. Supp. 799, 801-02
 8 (E.D. Pa. 1983), *aff’d* 738 F.2d 422 (1984), the first insurer “admitted that no notice of
 9 cancellation was ever sent to the Bank as mortgagee. . . . Given the existence of the
 10 [second] policy, however, [the first insurer] argues that its obligation to the Mortgagee was
 11 cancelled as of the date [the second insurer] assumed coverage, and therefore [the second
 12 insurer] is not entitled to seek contribution from [the first insurer] for the loss claimed by
 13 the Mortgagee. The Court agrees.” The court found that in obtaining the second policy, the
 14 mortgagee “extinguished” its rights against the first insurer. *Id.* at 802. Similarly, in *Carter*
 15 *v. Allstate Indem. Co.*, 592 So. 2d 66, 71 (Miss. 1991), the first insurer cancelled the policy
 16 but admitted that it did not send the mortgagee a copy of the cancellation notice. The Court
 17 nonetheless found that the first policy was cancelled: “[t]he purpose of the union or standard
 18 mortgage clause is to protect the mortgagee from *loss* occurring after the mortgagor or
 19 owner has caused a lapse in insurance coverage. In the case sub judice, however, there was
 20 no detrimental lapse in insurance coverage. A policy issued by Lexington, which exceeded
 21 the coverage originally provided by Allstate, was in force at the time of the fire. Absent the
 22 Bank’s undertaking of a new agreement with Carter, there would have been no loss
 23 whatsoever to the Bank.” *Id.* at 71-72 (citations omitted).

24 Here, EMC knew that the Farmers policy had been cancelled, as it was copied on the
 25 cancellation letter. *See* Wilson Decl. Ex. 5 (“02/07/06 14:24:33 ... CANCELLATION
 26 DUE TO NON-PAY INSCO: FARMERS INSURANCE. POLICY NO: 927231941
 27 CANCEL DT: 1/27/06”). When the Farmers policy cancelled, the ASIC coverage
 28 automatically took effect by operation of the Master Policy, and EMC then purchased a full-

1 year full-coverage policy through ASIC. In doing so, EMC waived any continuing
2 coverage under the Farmers LLPE.

3 **2. The Policy Benefits Were Equitably Prorated.**

4 Even if this Court finds that EMC did not waive its protection under the Farmers
5 LLPE and that the Farmers LLPE continued to provide some coverage, the ASIC policy
6 also insured the property because, as a matter of California law, the two policies provided
7 pro rata coverage.

8 Both the Farmers LLPE and the ASIC policy contain clauses addressing what
9 coverage will be provided in the event the property is insured by another policy. The
10 Farmers LLPE provided that “[i]f there be any other insurance upon the within described
11 property, this Company shall be liable under this policy as to the Lender for the proportion
12 of such loss or damage that the sum hereby insured bears to the entire insurance of similar
13 character on said property under policies held by, payable to and expressly consented to by
14 the Lender.” Wilson Decl. Ex. 23 at ASIC-WAHL0000403 ¶ 5. The ASIC policy has two
15 different clauses addressing the consequence of other insurance on the property. The Other
16 Insurance Endorsement operates to terminate coverage on the effective date of other
17 insurance, and states that “[i]n no event shall this insurance apply as excess or contributing
18 insurance when other applicable insurance that is in force on the date of loss.” Wilson Decl.
19 Ex. 16 at WAHL0014. The ASIC policy also states that, “[i]f there is any other valid or
20 collectible insurance which would attach if the insurance under this policy had not been
21 effected, this insurance shall apply only as excess and in no event as contributing insurance
22 and then only after all other insurance has been exhausted.” *Id.* at WAHL0022.

23 California courts repeatedly have reaffirmed that the effect of competing “other
24 insurance” clauses, such as the ones at issue here, is to require coverage to be equitably
25 prorated under both policies. California law “require[s] equitable contributions on a pro
26 rata basis from all primary insurers regardless of the type of ‘other insurance’ clause in their
27
28

1 policies.” *Dart Indus., Inc. v. Commercial Union Ins. Co.*, 28 Cal. 4th 1059, 1080 (2002).¹³

2 Conflicting other insurance clauses

3 are mutually repugnant. If we enforce [the excess/escape] clause, then we
4 cannot enforce the clauses of the other primary insurers. Thus, the only
5 proper result is to ignore all of the clauses and require some equitable pro
6 rata apportionment. This result is consistent with the public policy
disfavoring escape clauses whereby promised coverage evaporates in the
presence of other insurance.

7 *Century Sur. Co. v. United Pac. Ins. Co.*, 109 Cal. App. 4th 1246, 1260 (2003). As a matter
8 of law, therefore, ASIC was obligated to provide coverage to EMC for the entire period the
9 ASIC policy was in effect, notwithstanding any prior existing coverage under the Farmers
10 LLPE. Accordingly, the ASIC policy was neither cancelled at inception nor duplicative of
11 plaintiff’s prior coverage under the Farmers policy, and plaintiff’s “overlap” theory fails as
12 a matter of law.

13 **VI. CONCLUSION**

14 For all of the foregoing reasons, this Court should grant ASIC’s Motion for
15 Summary Judgment.

16
17 Dated: October 1, 2008

HELLER EHRMAN LLP

18
19 By: /s/ Peter S. Hecker

PETER S. HECKER

20 Attorneys for Defendant
21 AMERICAN SECURITY INSURANCE
22 COMPANY
23
24
25
26

27 ¹³ For a more detailed discussion of this issue, *see* ASIC’s Motion to Dismiss (Docket No. 20) at
28 11-13.